80-613

No.

Supreme Court, U. S.
FILED
OCT 15 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SHOSHONE and ARAPAHOE TRIBES,
Petitioners

v.

DRY CREEK LODGE, INC., *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October 1980

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. Whether an Indian tribe has no immunity from suit when sued by a non-Indian.

2. Whether this Court's decision in *Santa Clara Pueblo* v. *Martinez*, holding that the Indian Civil Rights Act does not waive tribal sovereign immunity, conflicts with the court of appeals' decision that an Indian tribe is not immune from a suit in federal court brought by a non-Indian corporation and non-Indian individuals for money damages under the Indian Civil Rights Act.

3. Whether this is an appropriate case for summary reversal.

LIST OF PARTIES

The petitioners are the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation, Wyoming.

The respondents are Dry Creek Lodge, Inc., a Wyoming corporation; Albert C. Cook; Elizabeth P. Cook; Thomas Burlingham; Benjamin Miller; Bernice Miller; Robert Miller and David Miller.*

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* Respondents' complaint, as amended, initially named as defendants the United States, the Secretary of the Interior, the Area Director of the Billings Area Office, Bureau of Indian Affairs, the Superintendent of the Wind River Agency, the BIA Special Officer, Wind River Agency, the Shoshone and Arapahoe Tribes, the Joint Business Council of the Shoshone and Arapahoe Tribes and the individual members thereof, and individual Indians who own an interest in certain trust allotments on the Wind River Reservation. All defendants except the Shoshone and Arapahoe Tribes have been dismissed at various stages of the case and are not parties to the proceedings in this Court.

The respondents Albert C. Cook, Elizabeth P. Cook and Thomas Burlingham are not Indian; the respondents Benjamin, Bernice, Robert and David Miller are.

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v.

DRY CREEK LODGE, INC., *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Shoshone and Arapahoe Tribes of the Wind River Indian Reservation, Wyoming, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (App. A, *infra*) are reported at 623 F.2d 682.

The findings of fact and conclusions of law of the district court (Judge Kerr) on the initial hearing dismissing the suit against the Tribes and federal officers are reproduced as Appendix B, *infra*.

The 1975 decision of the court of appeals reversing the dismissal of the case against the Tribes and federal officers (App. D, *infra*) is reported at 515 F.2d 926.

On July 18, 1977, after a jury trial, the district court (Judge Anderson) entered judgment dismissing a number of claims but awarding plaintiffs $525,000 in damages against the Shoshone and Arapahoe Tribes. (App. E, *infra.*)

On February 18, 1978, Judge Anderson entered an order (App. F, *infra*) granting a new trial to the Tribes on liability and damages. On October 12, 1978, after this Court's decision in *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, *supra*, Judge Anderson dismissed the action against the Tribes. The court's reasons for dismissal are given in the order of dismissal (App. G, *infra*) and in the transcript of the hearing of September 11, 1978 (App. H, *infra*).

JURISDICTION

The judgment of the court of appeals (App. A, *infra*) was entered on June 20, 1980. A timely petition for rehearing with suggestion for rehearing *en banc* was denied by the court of appeals on July 18, 1980. (Apps. I and J, *infra.*) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1301-1303, provides in pertinent parts:

> "1302(8).
>
> No Indian tribe in exercising powers of self-government shall
>
> * * *
>
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
>
> * * *

"1303.

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

25 U.S.C. 1301-1303 are reproduced in their entirety as Appendix K to this petition.

STATEMENT OF THE CASE

Background

Albert and Elizabeth Cook, both non-Indians, owned 160 acres of land within the Wind River Indian Reservation. The shortest means of access to their land from the nearest highway was by a three-and-one-half mile private dirt road crossing several pieces of land held in trust by the United States for individual Shoshone Indians as allottees. (App. B, *infra*, Findings Nos. 7, 8.)

Until 1974 the Cooks used their land solely for stock raising and residential purposes, and the allottees allowed them to use the road without objection although no right-of-way had been obtained. (App. D, *infra*, p. 23a; 515 F.2d at 929; App. B, *infra*, Findings Nos. 3, 6.)

Early in 1974 the Cooks formed Dry Creek Lodge, Inc., a Wyoming corporation, and began to construct a bar, restaurant and lodge on their land. When the allottees, the Bonatsie family, learned of the Cooks' planned commercial enterprise, they informed the Cooks that they objected to use of the private road for commercial purposes because of the increased vehicular traffic across their land. (Tr. Inj. 51, 84-85.)[1] At no time before or

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[1] "Tr. Inj." refers to the one-volume transcript of the hearing on plaintiffs' motion for a preliminary injunction dated June 7, 1974.

during the construction of the commercial facilities or after litigation commenced did the Cooks obtain a right-of-way over the Bonatsies' land as is required by federal law, 25 U.S.C. 323-325, and regulations, 25 C.F.R. Part 161. (See App. D, *infra*, pp. 22a-23a; 515 F.2d at 928-929; App. B, *infra*, Finding 13.)

When the Cooks continued to use the road and finally announced the grand opening of the lodge despite their failure to obtain a right-of-way, the Bonatsies protested to the governing bodies of the Shoshone and Arapahoe Tribes (the "Business Councils"). (App. D, *infra*, p. 23a; 515 F.2d at 929; Tr. Inj. 157-159.)

Responding to the Bonatsies' plea for assistance, the Business Councils adopted Resolution 3415, requesting the Wind River Agency of the Bureau of Indian Affairs to prevent further trespasses across individual trust land. (App. B, *infra*, Finding No. 11.) The Bonatsies then closed the road across their allotments. At the direction of the Superintendent of the Wind River Agency, the Bureau of Indian Affairs police assisted in keeping the road closed and in preserving the peace. (App. B, *infra*, Finding No. 12.)

The Proceedings in this Case

The Cooks, Dry Creek Lodge, Inc. and others brought suit in the United States District Court for the District of Wyoming to declare that they owned a right-of-way across the Bonatsies' land; to enjoin the United States, individual federal officials, the Tribes, the Business Councils and members thereof from interfering with their alleged right-of-way; and to obtain money damages for alleged conspiracies and due process and equal protection violations. Jurisdiction was invoked under 28 U.S.C. 1331, 1343 and 1353; 42 U.S.C. 1983 and 1985; and 25 U.S.C. 357 and 1302(8).

The district court (Judge Kerr) initially granted a temporary restraining order allowing plaintiffs to use the road for noncommercial purposes. After a hearing on the preliminary injunction, Judge Kerr issued findings of fact and conclusions of law (App. B, *infra*, July 11, 1974), and dismissed the case for lack of jurisdiction (App. C, *infra*, July 29, 1974). Judge Kerr found that the plaintiffs had not shown that they owned a right-of-way across the Bonatsies' land, that the United States and the Tribes possess sovereign immunity from suit, and that the individual defendants had not violated plaintiffs' civil rights or acted outside of their statutory authority. (App. B, *infra*, Conclusions 4, 6, 7, 17, 18, 19, 21, 24.) He also noted that plaintiffs had not pursued the available administrative procedures for obtaining a right-of-way over trust land through the Bureau of Indian Affairs. (App. B, *infra*, Conclusions 9 and 10.)

On appeal, the United States Court of Appeals for the Tenth Circuit reversed the district court's dismissal of the case against, among others, the federal officials and the Tribes.[2] The court of appeals noted, in an opinion written before this Court's decision in *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. 49, that other federal courts had held that the Indian Civil Rights Act implied a waiver of tribal sovereign immunity. It held that the district court had jurisdiction under 28 U.S.C. 1343 to hear claims against the Tribes based on the Indian Civil Rights Act. (App. D, *infra*, pp. 31a-35a; 515 F.2d at 932-934.)

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[2] The court of appeals affirmed the dismissal of the United States on the ground of sovereign immunity. The court found jurisdiction over the federal officials under 42 U.S.C. 1985 and under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). (App. D, *infra*, pp. 25a-30a; 515 F.2d at 930-932.)

On remand, after presentation of the plaintiffs' evidence, Judge Anderson [3] ruled that the road in question was not a public road.[4] (App. E, *infra*, p. 41a.) The judge then permitted the jury to consider claims for $1,500,000 in money damages against the Tribes for denial of equal protection and deprivation of liberty without due process in violation of 25 U.S.C. 1302(8), and against two individual federal defendants for deprivation of liberty without due process, but the judge instructed the jury not to award plaintiffs any commercial damages. The jury found in favor of the federal officials but awarded money judgments totalling $525,000 against the Tribes.[5] (Order of July 18, 1977, App. E, *infra*.)

On the Tribes' motion, the district court set aside the verdict against the Tribes and granted a new trial "with respect to liability and damages" (Order of February 18, 1978, App. F, *infra*) on the ground that the jury had disregarded the court's instructions related to damages.[6]

Soon thereafter, this Court decided *Santa Clara Pueblo* v. *Martinez*, *supra*, holding, *inter alia*, that the ICRA did not waive the Tribe's pre-existing sovereign immunity and therefore "suits against the Tribe under the ICRA

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[3] At the request of the plaintiffs, Judge Kerr recused himself, and the court designated Judge Anderson of Utah to hear the case.

[4] The Tribes do not dispute the respondents' or their successors' right of personal ingress and egress.

[5] Although the jury was instructed to determine liability and damages on the same basis for all plaintiffs and commercial damages were not to be considered, the verdict and judgment for $525,000 was divided to give $250,000 to each of the Cooks, the two non-Indian lodge owners, but only $5,000 each to the four Indian lodge employees and Mr. Burlingham.

[6] Before these issues went to the jury Judge Anderson had dismissed all other remaining defendants in the case, all conspiracy-based claims for damages, and seven Indian plaintiffs. (App. E, *infra*, p. 41a.)

are barred by its sovereign immunity from suit." 436 U.S. at 59. Thereupon the Tribes again moved to dismiss the case and the district court granted the motion on the ground that *Santa Clara* "squarely applies to this action." (Order of October 12, 1978, App. G, *infra.*)

The plaintiffs appealed the district court's dismissal of the case.[7] The court of appeals in a 2-1 decision again reversed and remanded for a new trial on the issues of damages.

In its brief opinion, which contains significant factual inaccuracies,[8] the court of appeals concluded that the ICRA tacitly waived tribal immunity from suit where the plaintiff is a non-Indian. The court attempted to distinguish *Santa Clara* as concerned only with "internal matters concerning tribal members," ignoring this Court's

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[7] The district court awarded costs to the Tribes, and the plaintiffs also appealed that ruling to the court of appeals.

[8] For example:

a) the court of appeals incorrectly states that the Tribal Business Councils are the "judicial bodies of the Tribes." (App. A, *infra*, p. 3a; 623 F.2d at 684.) To the contrary, the judicial body for the Tribes is a Court of Indian Offenses, an agency of the federal government established pursuant to 25 C.F.R. Part 11;

b) the court failed to acknowledge that the district court had granted a new trial "both as to liability and damages," thus leaving no factual conclusions that the Tribes had violated plaintiffs' rights. As a result the court "remanded for a new trial on the issue of damages," leaving for the district court to determine how to award damages when no finding of wrongdoing has been made;

c) though basing its decision on the fact that the plaintiffs are non-Indian, the court failed to note that four of the plaintiffs are Indians;

d) contrary to the court's statements regarding the Tribes' involvement in closing the road (App. A, *infra*, pp. 3a-4a; 623 F.2d at 684), the only tribal action ever shown was a formal resolution to request the Bureau of Indian Affairs and Bureau of Indian Affairs police to prevent illegal trespass across allotted land and to maintain the peace.

express holding that the ICRA did not waive tribal immunity from suit, and ignoring this Court's decisions in *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940) and *Puyallup Tribe* v. *Washington Department of Game*, 433 U.S. 165 (1977), which affirm tribal immunity against suits brought by non-Indians.

Judge Holloway, in his dissent, stated (App. A, *infra*, pp. 7a-8a; 623 F.2d at 685-686) that "the *Santa Clara* opinion compels dismissal as to the sole remaining defendants, the tribes," relying upon the broad terms in which the Supreme Court held that Section 1302 of the ICRA "does not impliedly authorize actions for declaratory or injunctive relief against the tribe or its officers." He concluded (App. A, *infra*, p. 8a; 623 F.2d at 686) "I must agree that these damage claims are likewise barred by the immunity doctrine, unless and until Congress provides otherwise."

The Tribes petitioned for rehearing with suggestion for rehearing *en banc*, pointing out that the court of appeals' decision is directly contrary to this Court's holding in *Santa Clara* that the ICRA does not waive tribal immunity from suit, and that the decision ignores the prior decisions of this Court recognizing tribal immunity and is contrary to the recent *en banc* decision of the court of appeals, which, in the context of a suit by non-Indians under the ICRA, held that a tribe possesses immunity from suit unless that immunity is specifically waived. *Merrion* v. *Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), No. 80-11, certiorari granted October 6, 1980.[9] The court of appeals denied the Tribes' petition. (Apps. I and J, *infra*.)

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[9] The two judges who wrote the majority opinion in the instant case were the only dissenting judges in *Jicarilla*. The court in *Jicarilla*, which upheld a tribal mineral tax, found that the Tribe's immunity had been expressly waived by the Tribe in its tax ordinance and by the Secretary of the Interior in approving the ordinance.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals Directly Conflicts with this Court's Consistent Decisions Upholding Tribal Immunity from Suit Including this Court's Recent Decision on the Indian Civil Rights Act, *Santa Clara Pueblo* v. *Martinez.*

This Court has clearly and consistently recognized Indian tribes' immunity from suit. As the Court stated in *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58-59 (1978), summarizing its prior decisions:

> "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Turner* v. *United States*, 248 U.S. 354, 358 (1919); *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513 (1940); *Puyallup Tribe* v. *Washington Dept. of Game*, 433 U.S. 165, 172-173 (1977). This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But 'without congressional authorization,' the 'Indian Nations are exempt from suit.' *United States* v. *United States Fidelity & Guaranty Co.*, *supra*, at 512.
>
> "It is settled that a waiver of sovereign immunity "'cannot be implied but must be unequivocally expressed.'" *United States* v. *Testan*, 424 U.S. 392, 399 (1976), quoting, *United States* v. *King*, 395 U.S. 1, 4 (1969)."[10]

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[10] As noted in note 2, *supra*, in the first appeal in the present case the court of appeals dismissed the plaintiffs' claims against the United States on the ground of sovereign immunity. (App. D, *infra*, pp. 25a-26a; 515 F.2d at 930.)

Tribal immunity has never depended on the identity of the plaintiff. In *United States Fidelity & Guaranty Co.*, *supra*, and *Puyallup Tribe*, *supra*, the plaintiffs were non-Indian. Moreover, the detriment to a tribe is equal whether a judgment is recovered against the tribal treasury by an Indian or a non-Indian.

For a time there was a question as to whether the Indian Civil Rights Act waived tribal immunity from suit. This Court, however, settled the matter in *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. 49, reversing this same court of appeals and holding specifically that (*id.* at 59): "* * * *suits against the tribe under the ICRA are barred by its sovereign immunity from suit.*" (Emphasis added.) There is no vagueness in that holding.[11]

The decision of the court of appeals below is thus directly contrary to the decision of this Court in *Santa Clara*. Its reasoning seems to be based on a double fallacy. First, the court suggests that even where there is sovereign immunity there must be some court that can render judgment against the sovereign itself. (*See* App. A, *infra*, p. 6a; 623 F.2d at 685.) But the purpose of sovereign immunity is to protect the sovereign

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[11] The Court noted (*ibid.*) that "[n]othing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief" and that habeas corpus is the only federal review provided by the ICRA. The plaintiffs in *Santa Clara* sought injunctive and declaratory relief. There is equally nothing in the ICRA purporting to subject the Tribes to money damages—a more central area of tribal immunity than injunctive or declaratory relief. In both *Turner* v. *United States*, 248 U.S. 354 (1919) and *United States* v. *United States Fidelity & Guaranty Co.*, *supra*, 309 U.S. 506 (1940), this Court held that tribal sovereign immunity barred suits for damages. Sovereign immunity, which bars suits, not just judgments, against the sovereign does not depend upon the type of redress that a plaintiff seeks.

against suits in any court, particularly for money judgments, unless that immunity has been specifically and unequivocally waived. Second, the court of appeals seems to assume that tribal immunity was *created* by the Indian Civil Rights Act. (*See* App. A, *infra*, p. 6a; 623 F.2d at 685.) But tribal immunity long predated that Act and simply was not waived by the Act. There is nothing new in tribal governments being immune from suit. The writ of certiorari should thus be issued, and the judgment of the court of appeals reversed to correct its disregard of this Court's decisions.[12]

II. The Court of Appeals' Decision Conflicts with the Decisions of Other Courts of Appeals and with Its Own Prior Ruling.

Since this Court's decision in *Santa Clara*, the Courts of Appeals for the Fourth, Eighth and Ninth Circuits have all held that suits brought against Indian tribes under the Indian Civil Rights Act are barred by tribal sovereign immunity. *Crowe* v. *Eastern Band of Cherokee Indians, Inc.*, 584 F.2d 45 (4th Cir. 1978); *Mousseaux* v. *Rosebud Sioux Tribe*, 582 F.2d 1287 (8th Cir. 1978); *Stands Over Bull* v. *Crow Tribe*, 578 F.2d 799 (9th Cir. 1978) (withdrew previous opinion *sua sponte* in light of *Santa Clara*). To be sure, these cases all involve suits by Indians, but in light of this Court's holding in *Santa Clara* that the ICRA did not waive tribal

[12] The court of appeals' opinion appears to be based on sympathy for the plaintiffs, rather than law, but that sympathy is misplaced. If the plaintiffs had followed the statutory and regulatory procedures for obtaining a right-of-way, and not determined to ride roughshod over the wishes of the Indian allottees, there would have been no lawsuit. Moreover, the plaintiffs had their full day in court against the federal officers who permitted the road to be blocked and guarded the blockade, and against the individual Indians who blocked the road, but the plaintiffs lost on the merits. They are not entitled to proceed against the Tribes themselves in disregard of the Tribes' immunity from suit.

immunity, and the irrelevancy of the race of the plaintiff to sovereign immunity, they may fairly be said to conflict with the decision of the court of appeals here.[13]

The United States District Courts for the District of Arizona and the Southern District of Florida have each expressly held that suits by non-Indians against Indian tribes under the ICRA are barred by tribal sovereign immunity, relying upon this Court's decision in *Santa Clara. Salt River Agricultural Improvement & Power Dist.* v. *Navajo Tribe*, 5 Ind. L. Rep. F-116 (D. Ariz. 1978); *Shubert Construction Co. Inc.* v. *The Seminole Housing Authority*, 7 Ind. L. Rep. 3121 (S.D. Fla. 1980).[14]

The court of appeals' decision, as we have noted, even contradicts its own prior decision in *Merrion* v. *Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), where the court considered the issue of federal jurisdiction in a suit under the ICRA brought by non-Indians against an Indian tribe for declaratory and injunctive relief to prevent enforcement of a tribal oil and gas severance tax. The court recognized the validity of the doctrine of tribal sovereign immunity whether the plaintiff is Indian or non-Indian and noted, citing *Santa Clara* and *United*

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[13] Numerous federal district courts have also dismissed suits brought by Indians. *Wells* v. *Philbrick*, 486 F. Supp. 807 (D. S.D. 1980); *Rodriguez* v. *La Jolla Band of Mission Indians*, 7 Ind. L. Rep. 3088 (S.D. Cal. 1980); *Thompson* v. *State of New York*, 487 F. Supp. 212 (N.D. N.Y. 1979); *Wilson* v. *Turtle Mountain Band of Chippewa Indians*, 459 F. Supp. 366 (D. N.D. 1978). *Thompson*, *Wells* and *Wilson* involved claims for damages.

[14] The United States District Court for the District of Utah also held that a suit brought by a non-Indian against a tribe under the ICRA and other federal statutes was barred by tribal sovereign immunity. The United States Court of Appeals for the Tenth Circuit affirmed the lower court dismissal on other grounds. *Wardle* v. *Ute Indian Tribe*, 5 Ind. L. Rep. L-20 (D. Utah 1978), *aff'd*, 623 F.2d 670 (10th Cir. 1980). Copies of these opinions are being lodged with the Clerk.

States Fidelity & Guaranty Co., that "these cases clearly hold a tribe cannot be sued absent consent." [15]

III. The Decision of the Court of Appeals Has Important and Far-Reaching Consequences for Indian Tribes and Federal Indian Law.

The court of appeals' decision in this case profoundly alters the boundaries of the doctrine of tribal sovereign immunity. First, contrary to all judicial precedent, *e.g.*, *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 58-59, 61; *United States* v. *United States Fidelity & Guaranty Co.*, *supra*, 309 U.S. at 512, the court in effect found that Congress had *impliedly* waived tribal sovereign immunity in a statute that expressly and deliberately provided for only one remedy, habeas corpus. Consequently, the court of appeals' decision, if allowed to stand, would allow federal courts to interfere with the plenary authority of Congress to determine the scope of tribal sovereign immunity, a result which is contrary to the limited role that this Court has consistently established for the federal judiciary in this area. *Santa Clara*, *supra*, 436 U.S. at 60.

Perhaps even more significantly, the court of appeals' decision alters the substance of the doctrine of tribal sovereign immunity by providing that its applicability in a suit under the Indian Civil Rights Act depends upon the race of the plaintiff. This consideration is properly irrelevant to sovereign immunity. One of the primary purposes of the doctrine of sovereign immunity is to protect the treasury of a government. *See Edelman* v. *Jordan*, 415 U.S. 651, 673-74 (1974); *Thebo* v. *Choctaw Tribe*, 66 F. 372, 376 (8th Cir. 1895). Hence sovereign immunity protects the United States against claims for damages unless Congress expressly consents to such suits no matter who the plaintiff is or where

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[15] As noted at note 9, *supra*, the court found such consent had been given.

the suit is brought. *See, e.g.*, Federal Tort Claims Act, 60 Stat. 842, 28 U.S.C. 2671-2680.

Until the court of appeals' decision in the present case, no federal appellate court ever had authorized an award of monetary damages against an Indian tribe in any forum, whether suit was brought by an Indian or non-Indian. (*See Thebo* v. *Choctaw Tribe*, *supra*, 66 F. 372, and *United States* v. *United States Fidelity & Guaranty Co.*, *supra*, 309 U.S. 506. And, as this Court noted in *Santa Clara*, *supra*, 436 U.S. at 64, Congress in enacting the Indian Civil Rights Act did not want to "impose serious financial burdens on already 'financially disadvantaged' tribes by subjecting them to suit in federal court."

The importance of sovereign immunity is far greater to Indian tribes than to the federal government, though the principles governing it are the same as to either government. Indian tribes lack the broad tax base and deep treasuries that the United States has. Tribal people, among the poorest groups in the Nation, depend on services and revenues from tribal governments for their livelihood. Defense of numerous suits and payment of large judgments to individuals can deplete tribal treasuries. Moreover, tribal governments exist among non-Indian populations often hostile to them, which increases the risk of suit and the risk of decisions by unfriendly juries. Many of the elements that called for special protection of Indian tribes exist today just as they did when this Court spoke in *United States* v. *Kagama*, 118 U.S. 375, 384 (1886).

Until now, tribes have been protected by their immunity from suit which has been recognized by the courts and Congress. This decision poses a major threat to Indian tribes in the Tenth Circuit, where many of the major tribes are located, and throughout the country. Unless reversed, the decision will stimulate suits for damages against the tribes.

IV. This Is An Appropriate Case for Summary Reversal.

This Court has fully considered and ruled on and upheld tribal immunity from suit in *United States* v. *United States Fidelity & Guaranty Co., supra, Puyallup Tribe* v. *Washington Dept. of Game, supra,* and has specifically held in *Santa Clara* that the Indian Civil Rights Act does not waive this immunity. The decision of the court of appeals is contrary to those decisions, its own prior *en banc* decision and the consistent decisions in other circuits. There is no reason for the Court to use its time or the parties' time and money to decide the same issues again. It is therefore respectfully suggested that the decision of the court of appeals should be summarily reversed.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the court of appeals should be summarily reversed on the basis of *Santa Clara Pueblo* v. *Martinez, Puyallup Tribe* v. *Washington Department of Game* and *United States* v. *United States Fidelity & Guaranty.*

Respectfully submitted,

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October 1980

Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1999

[June 20, 1980]

DRY CREEK LODGE, INC., a Wyoming corporation, *et al.*,
Plaintiffs-Appellants,

v.

ARAPAHOE and SHOSHONE TRIBES,
Defendants-Appellees.

On Appeal From The
United States District Court
For The District of Wyoming

(D.C. No. C 74-74A)

John R. Hursh of Central Wyoming Law Associates, P.C., Riverton, Wyoming (G. L. Spence of Spence, Moriarity & Schuster, Jackson, Wyoming, with him on the brief), for Appellants.

Harry R. Sachse of Sonosky, Chambers & Sachse, Washington, D.C. (Marvin J. Sonosky of Sonosky, Chambers & Sachse, Washington, D.C., with him on the brief for

Appellee Shoshone Tribe; R. Anthony Rogers of Wilkinson, Cragun & Barker, Washington, D.C., on the brief for Appellee Arapahoe Tribe), for Appellees.

Before SETH, Chief Judge, HOLLOWAY and BARRETT, Circuit Judges.

SETH, Chief Judge.

The case originally came to this court upon a dismissal of plaintiffs' complaint for damages for lack of jurisdiction. We reversed and remanded the case for trial. Dry Creek Lodge, Inc. v. United States, 515 F.2d 926 (10th Cir.). The previous opinion contains the holdings as to parties and disposition of several issues.

Upon remand the case was tried on the merits. The jury returned a verdict for plaintiffs against the defendant Tribes only, judgment was entered, and costs were assessed against the Tribes. On motion by defendant Tribes the trial court granted a new trial on the ground that the jury did not properly handle the issue of damages.

Before the case was retried the Supreme Court handed down Santa Clara Pueblo v. Martinez, 436 U.S. 49. The trial court thereupon dismissed the action on the theory that *Santa Clara* had decided the issue of jurisdiction. The plaintiffs have taken this appeal.

The facts are, of course, the same as on the original appeal, and the case is again before us following a dismissal for lack of jurisdiction.

The facts are set out in our previous opinion but some restatement appears to be useful. Plaintiffs' land is within the exterior boundaries of the Wind River Reservation of the Shoshone and Arapahoe Indians in Wyoming. The reservation is large and the town of Riverton and other

settlements are within its boundaries. Many more non-Indians than Indians live within the boundaries. There are a large number of patented tracts owned in fee by non-Indians not including the property in Riverton. The reservation boundaries have changed substantially from time to time.

The lands of plaintiff corporation were patented to a predecessor in title in 1924. There was a small road providing access from the land of Dry Creek Lodge to the principal highway. This had been used by plaintiffs and other persons for access to the fee land and other lands for a period of some eighty years.

Plaintiffs Cook, who are non-Indians, had owned the 160-acre tract for about ten years and had lived there. They decided to build a guest lodge for hunting, and consulted the superintendent of the reservation about the matter. He advised them that projects of that type were encouraged to provide employment. He also stated that there would be no access problem. A license to plaintiffs Cook was issued for the business. The individuals then formed Dry Creek Lodge, Inc. to build the facilities. This was done with a SBA loan. The lodge was completed and opened, but the next day the Tribes closed the road at the request of a nearby Indian family, the Bonatsies. The access road had crossed an allotment belonging to this family. Apparently the plaintiffs have lost the property by foreclosure. The access road was closed in 1974.

The Tribes have a Joint Business Council which is composed of the Business Councils of each Tribe. These Councils are the legislative, executive and judicial bodies for the Tribes. The Tribal Business Councils are elected by members of each Tribe. The record contains the minutes of several meetings of the Joint Council relative to closing the business and the access road. The Council directed that access to the Dry Creek Lodge be prevented

by the federal officers, and the Bonatsies were apparently to erect the barricade. With the road blocked the persons on the Dry Creek land could not get out and were for all practical purposes confined there until a federal court issued a temporary restraining order. Thereafter the plaintiffs sought a remedy with the tribal court, but were refused access to it. The judge indicated he could not incur the displeasure of the Council and that consent of the Council would be needed. 25 C.F.R. § 11.22. The consent was not given. The state court cases were apparently removed to the federal court. In the federal court the defendants urged that there was no remedy—no jurisdiction. The defendants again assert there is no remedy in the federal court by reason of the *Santa Clara* case. The Tribal Business Council, according to the minutes, directed that the differences between the Bonatsie family and the plaintiffs should be settled by self-help, and this was done. The plaintiffs, however, did not respond in the same way. The defendants argue here, as they did in the trial court, that the plaintiffs have no remedy. There is no forum where the dispute can be resolved and the personal and property rights asserted by plaintiffs be considered.

Before considering the *Santa Clara* opinion we would like to look at one aspect of Oliphant v. Suquamish Indian Tribe, 435 U.S. 191. This relates to the sovereignty holding by the Ninth Circuit. The circuit had in substance held that the authority there in issue was presumed to be in the Tribe unless Congress had acted. The majority in the circuit opinion posed the question as to whether Congress had taken away the sovereignty of the Tribe as to the matter in issue. The Supreme Court reversed and turned the matter around. The Court said:

> "But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court

> of Appeals recognized, Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers '*inconsistent with their status.*' " (Emphasis supplied.)

The Court in *Oliphant* also said:

> "Protection of territory within its external political boundaries is, of course, as central to the sovereign interests of the United States as it is to any other sovereign nation. But from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty."

Santa Clara Pueblo v. Martinez, 436 U.S. 49, was an action by a member of the Tribe challenging the Tribe and its officials as to the criteria used to determine property ownership and tribal membership. It was entirely an internal matter concerning tribal members and a matter of very great importance to the individuals. Injunctive and declaratory relief were sought. The members of the Tribe who were seeking relief also had access to their own elected officials and their tribal machinery to settle the problem. The Supreme Court held that the Indian Civil Rights Act could not be used by the plaintiffs under such circumstances to obtain an injunctive remedy against the Tribe. There was no "reservation" involved in *Santa Clara* as the lands had been granted to Santa Clara as a pueblo by the Governments of Spain or Mexico long before the American occupation. The issue and control was on the basis of ownership, tribal membership, and tribal use of its own lands. The problem was thus strictly an internal one between tribal members and the tribal government relating to the policy of the

Tribe as to its membership. Of course, there were no non-Indians concerned.

By the decision in *Santa Clara* the tribal members seeking injunctive relief under the Indian Civil Rights Act were in substance directed to the remedies available to them in their own tribal courts and from the officials they had elected. Much emphasis was placed in the opinion on the availability of tribal courts and, of course, on the intratribal nature of the problem sought to be resolved. With the reliance on the internal relief available the Court in *Santa Clara* places the limitations on the Indian Civil Rights Act as a source of a remedy. But in the absence of such other relief or remedy the reason for the limitations disappears.

The reason for the limitations and the references to tribal immunity also disappear when the issue relates to a matter outside of internal tribal affairs and when it concerns an issue with a non-Indian.

It is obvious that the plaintiffs in this appeal have no remedy within the tribal machinery nor with the tribal officials in whose election they cannot participate. The record demonstrates that plaintiffs sought a forum within the Tribes to consider the issue. They sought a state remedy and sought a remedy in the federal courts. The limitations and restrictions present in *Santa Clara* should not be applied. There has to be a forum where the dispute can be settled.

The plaintiffs alleged that their personal and property rights under the Constitution had been violated by the defendants. A jury so found and awarded damages. There must exist a remedy for parties in the position of plaintiffs to have the dispute resolved in an orderly manner. To hold that they have access to no court is to hold that they have constitutional rights but have no remedy. The self-help which was suggested to shut down

plaintiffs' "business," according to the Council minutes, and which was carried out with the help of the federal police, does not appear to be a suitable device to determine constitutional rights.

The Judgment and Order are reversed and the case is remanded for a new trial on the issue of damages.

HOLLOWAY, Circuit Judge, dissenting:

I respectfully dissent.

To me this is a most disturbing case because of the result I feel compelled to reach. The jury found a violation of the plaintiffs' civil rights recognized by § 1302 of the Indian Civil Rights Act, under most distressing circumstances. And yet it seems we must say that the doors are closed against any orderly redress for the wrongs. State and federal courts are barred by the immunity doctrine from hearing the claims and access was denied to the tribal court, as the majority opinion points out. Nevertheless, I must reluctantly agree with the trial court's conclusion that the *Santa Clara* opinion compels dismissal as to the sole remaining defendants, the tribes.

It is true, as the majority opinion emphasizes, that the *Santa Clara* case arose from a controversy of an intra-tribal nature where a remedy was sought by a person who could participate in the elective process and who had access to the tribal courts and other tribal machinery—a far cry from this case. The Supreme Court, however, laid down its holding in *Santa Clara* in broad terms of the tribes' traditional immunity from suit, of the absence in the Indian Civil Rights Act of provisions subjecting the tribes to federal court jurisdiction in civil actions for injunctive or declaratory relief, and of the exclusivity of the grant of federal habeas jurisdiction in § 1303, which was viewed as a deliberate failure to provide other remedies. The Court rejected the claim of jurisdiction, concluding that:

> . . . unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers. . . . (436 U.S. at 72).

I must agree that these damage claims are likewise barred by the immunity doctrine, unless and until Congress provides otherwise. *Wilson v. Turtle Mountain Bank of Chippewa Indians, et al*, 459 F. Supp. 366, 369 (D.N.D.). Thus I am constrained to dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C74-74

DRY CREEK LODGE, INC., *et al.*,
Plaintiffs,

vs.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter came on regularly for hearing before this Court, the plaintiffs being represented by their attorneys John R. Hursh of Riverton, Wyoming, and G. L. Spence of Casper, Wyoming; and the non-federal defendants being represented by their attorneys Marvin J. Sonosky of Washington, D.C., and William J. Thomson, Cheyenne, Wyoming, and the federal defendants being represented by Richard V. Thomas, United States Attorney for the District of Wyoming; and the Court having taken the evidence and testimony of witnesses and having heard the arguments of counsel, and having carefully reviewed the pleadings and amendments thereto, exhibits and briefs filed by the parties, and being fully advised in the premises, finds the facts specially and states separately its conclusions of law thereon, as follows:

Findings of Fact

1. That, this is an action by Dry Creek Lodge, Inc., a corporation organized under the laws of the State of Wyoming with its principal place of business in Fremont County, Wyoming; and by its principal owners and direc-

tors, Albert C. Cook and Elizabeth Cook, both non-Indians, to establish a means of ingress and egress to the Dry Creek Lodge Ranch.

2. That, Albert and Elizabeth Cook are the record owners in fee of 160 acres, which lands are located within the exterior boundaries of the Wind River Indian Reservation.

3. That, the 160 acres were purchased by Albert and Elizabeth Cook in 1965; and until 1973, the lands had been used solely for stockraising purposes, during which time ingress or egress had not been denied by any of the defendants.

4. That, Dry Creek Lodge, Inc., is engaged in, or desires to engage in, the business of conducting a resort lodge, with drinking and dining facilities; and to conduct hunting and outfitting expeditions.

5. That, the other party plaintiffs are Indian employees of Dry Creek Lodge, Inc., who allege they will lose their employment if construction of Dry Creek Lodge does not go forward.

6. That, prior to 1974, the lands owned by Dry Creek Lodge, Inc., had been used solely for stockraising purposes; and there had been no commercial enterprises on the land of the nature proposed by plaintiffs.

7. That, ingress to Dry Creek Lodge is by means of a primary dirt roadway, connecting to U.S. Highway 26, of approximately 3.5 miles in length, which roadway crosses some lands owned in fee and some lands which are held in trust by the United States for the benefit of the Shoshone Indian Tribe; and by another longer route or roadway which crosses trust lands of the Shoshone and Arapahoe Tribes.

8. That, of the lands held in trust, some are lands allotted to the individual Bonatsies, named as defendants

herein, who are Indians and members of the Shoshone Indian Tribe.

9. That, the other defendants are employees or officials of the United States, or are members of the Joint Business Council of the Arapahoe and Shoshone Tribes.

10. That, upon commencement of commercial operations by Dry Creek Lodge, Inc., a blockade was established on the primary access roadway by the Indian owners (Bonatsies) of the allotted trust lands over which the primary roadway coursed, in protest of this unprecedented use of the land which would result in a greatly increased volume of vehicular traffic.

11. That, the Business Councils of the Arapahoe and Shoshone Tribes requested, by resolution, the Superintendent of the Wind River Indian Reservation to protect the trust lands of the defendant Bonatsies and to ensure that no breach of the peace occurred.

12. That, the Superintendent of the Wind River Indian Reservation did thereupon dispatch Special Police Agents of the Bureau of Indian Affairs to supervise the blockade and to prevent any non-authorized traffic from crossing the allotted lands.

13. That, no valid easement or right-of-way across the allotted lands is shown as existing of record.

14. That, the Small Business Administration, which made a loan to the Dry Creek Lodge, Inc., expressed concern over the right of ingress and egress to the Superintendent of the Wind River Indian Reservation, who did advise the Small Business Administration that no valid right-of-way had been granted or made of record.

15. That, plaintiffs have not made the appropriate application for a right-of-way.

16. That, plaintiffs have not obtained the consent of the Indian owners, nor followed tribal regulations, for a right-of-way.

17. That, this Court entered a Temporary Restraining Order on May 21, 1974, which was continued by consent of the parties, with modifications, for fifteen (15) days from June 7, 1974, which resulted in removal of the blockade and allowed ingress and egress on a limited basis, but not for any commercial purpose.

18. That, plaintiffs pray to this Court that it enter a declaratory judgment declaring a "way of necessity across the lands described in the complaint"; or that this Court enjoin permanently the defendants from in any way interfering with plaintiffs' free use and access of the roadway crossing the allotted lands; and in the alternative, that the Court award damages to the individual plaintiffs.

19. That, plaintiffs appear to allege, not in short, plain, and concise statements, that jurisdiction for this action is conferred on this Court as to the various defendants, by virtue of 28 U.S.C., §§ 1331 ($10,000 and a federal question); 1343 (conferring jurisdiction for actions authorized by 42 U.S.C., § 1985); 1353 (suit involving right of an Indian to an allotment); 42 U.S.C., §§ 1983 (providing for suits for deprivation of civil rights under color of state law); 1985 (providing for suit for conspiracy by private persons acting under color of state law to deny another of equal protection of the laws); 25 U.S.C.A., §§ 357 (authorizing condemnation of Indian lands for a public purpose); 1302(8) (prohibiting denial to any person by an Indian tribe of its laws).

20. That, defendants have filed motions to dismiss and for summary judgment; that there exists no material issues as to any genuine issues of fact; and that such motions may be treated in a like manner.

Conclusions of Law

1. That, this Court is one of limited jurisdiction and no presumptions of federal jurisdiction exist. National Indian Youth Council v. Bruce, 485 F. 2d 97 (10th Cir. 1973); and that jurisdiction is determined by the facts, and not by conclusory allegations of jurisdiction.

2. That, the defendant, United States of America, holds the lands in dispute as trustee for the individual Indian defendants, the Bonatsies.

3. That, since some of the lands through which the claimed "way of necessity" passes are owned by the United States, the extent of any easement is governed by federal law unless there is a federal statute which makes state or local law applicable. Superior Oil Co. v. United States, 353 F. 2d 34 (9th Cir. 1965); United States v. Oklahoma Gas & Electric Co., 127 F. 2d 349 (10th Cir.), aff'd. 318 U.S. 206 (1943).

4. That, a way of necessity never exists where one has access to granted land through other land of his own, or over a way granted to him, however inconvenient the way may be. 2 Thompson on Real Property, § 363 (1962). Therefore, plaintiffs claim that a "way of necessity" be declared as to the road connecting with U.S. Highway 26 is deficient and flawed as long as the other access is available as shown, above, and so long as procedures are available for seeking the granting of such access, below.

5. That, all questions with respect to rights of occupancy in land, the manner, time and conditions of extinguishment of Indian title are solely for consideration of the federal government. Bennett County, South Dakota v. United States, 394 F. 2d 8 (8th Cir. 1968). Wyoming statutes on condemnation are inapt and inapplicable to the issue of a right-of-way over allotted lands held in

trust; where as here, the consent of the Secretary of the Interior for this suit has not been obtained.

6. That, as a party whose interest would be affected, and in whose absence any relief would be inadequate, the United States is an indispensable party; and, it cannot be sued without its consent, and any conditions or limitations must be strictly observed and exceptions thereto are not to be implied. Soriano v. United States, 352 U.S. 270 (1957); Minnesota v. United States, 305 U.S. 382 (1939); Hamilton v. Nakai, 453 F. 2d 152 (9th Cir. 1972). The United States has not consented to this suit; and as shown, below, the statutes claimed by plaintiff to confer jurisdiction do not.

7. That, the Arapahoe and Shoshone Tribes are cloaked with the doctrine of immunity, which is coextensive with that of the United States. United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940); which immunity may be modified by Congress through its plenary power. See 25 U.S.C., § 1302.

8. That, it is axiomatic that all administrative remedies normally must be exhausted before a Court will exercise its extraordinary equitable remedies.

9. That, where there are available administrative procedures for the determination of an application for a right-of-way by the Bureau of Indian Affairs, see 25 U.S.C.A., § 324, 25 C.F.R., § 161 et seq., the jurisdiction of this Court is relegated to a secondary position, in deference to the primary jurisdiction of the agency.

10. That, where the administrative remedies have not been exhausted and have not been shown that they would be futile if pursued to their culmination, the Court will show deference to the agency charged with the duty of carrying out statutory mandates, especially where construction of treaties might be involved. Kolovrat v. Oregon, 366 U.S. 187 (1961); Garvey v. Freeman, 397

F. 2d 600 (10th Cir. 1968); Board of Com'rs of Pawnee County, Okla. v. United States, 139 F. 2d 248 (10th Cir. 1943). Plaintiffs have not made any application pursuant to the Regulations, 25 C.F.R., § 161 et seq., and the remedy they seek is one that could be granted. cf. McCurdy v. Steele, 353 F. Supp. 629 (D. Utah 1973).

11. That, any decision affecting rights or privileges of an applicant may be appealed. 25 C.F.R., § 2.1 et seq.

12. That, such administrative procedures offer, in this case, a plain, adequate and complete remedy at law barring this Court from granting injunctive or other equitable relief.

13. An action for declaratory judgment does not give this Court jurisdiction, as it merely adds a remedy when the Court already has jurisdiction to entertain the suit. See Wells v. United States, 280 F. 2d 275 (9th Cir. 1960). Plaintiffs apparently, without so alleging, seek such relief under 28 U.S.C., § 2201; but where a special statutory proceeding has been provided, declaratory relief should be withheld pending resort to such remedies; especially where, as here, it could be determinative of the controversy.

14. That, for 28 U.S.C., § 1331, to confer jurisdiction on this Court, more than a mere allegation that the action arises under the Constitution, laws or treaties of the United States is required. It must be shown that a right or immunity created by the Constitution or laws of the United States will be enhanced or diminished, depending on the construction given to the Constitution or laws of the United States. Gully v. First National Bank, 299 U.S. 109 (1936); Prairie Band of the Pottawatamie Tribe of Indians v. Puckkee, 321 F. 2d 767 (10th Cir. 1963).

15. That, jurisdiction does not exist under 28 U.S.C., § 1331, as no substantial question arises under the

treaties and laws of the United States, especially, as plaintiffs claim, under the treaty with the Shoshone creating the Wind River Indian Reservation, 15 Stat. 673 (1868); for without a more clearly expressed provision, it cannot be assumed that Congress intended to impose a servitude upon the land within the reservation without requiring the consent of the tribe or Secretary of the Interior, and without payment of compensation for the taking. See Bennett County, South Dakota v. United States, above, at 15. As stated above, any effect that this treaty might have on the rights claimed by plaintiffs should be determined administratively.

16. That, plaintiffs allege, inter alia, that a cause of action is stated pursuant to 42 U.S.C. §§ 1983 and 1985; and, that, jurisdiction is conferred by 28 U.S.C., § 1343.

17. That, it is fundamental that 42 U.S.C., § 1983, does not support a cause of action unless it is shown that there was a deprivation of one's civil rights by a person acting under color of law of a State or territory. Loncassion v. Leekity, 334 F. Supp. 370 (D. N.Mex. 1971). It has not been shown that any of the defendants were acting under color of any statute or ordinance of any State or Territory. There was no state action. The Court, thus, does not reach the question of whether any constitutional rights of the plaintiffs were, in fact, violated.

18. That, 42 U.S.C., § 1985, the Ku Klux Klan Act, provides a cause of action where persons conspire to deny another the equal enjoyment of rights secured by law to all. Griffin v. Breckenridge, 403 U.S. 88 (1971). The defendant Bonatsies, or any of the other defendants, in blockading the road, did not deny plaintiffs equal protection of the laws, as there was no state action involved, so as to invoke the provisions of the Fourteenth Amendment. Nat'l. Federation of Ry. Workers v. National Mediation Board, 110 F. 2d 529 (D.C. Cir. 1940). The

provisions of the Fourteenth Amendment, in fact, do not apply to Indian Tribes. See Legislative History of 25 U.S.C.A., § 1302, at 2 U.S. Code Cong. and Ad. News 1864 (90th Cong. 1968).

19. That, plaintiffs have not been denied equal protection of the laws; for if anything, they may have been denied due process, but this the Court does not reach, nor does 42 U.S.C., § 1985, reach a conspiracy to deny a person due process of law.

20. That, as no conspiracy mentioned in 42 U.S.C.A., § 1985, or a conspiracy to violate 42 U.S.C.A., § 1983, was proved or attempted to be proved, the claim of jurisdiction pursuant to 28 U.S.C., § 1343, must fail. Rincon Band of Mission Indians v. County of San Diego, 495 F. 2d 1 (9th Cir. 1974).

21. That, the officials herein named as defendants to this action were acting within the outer perimeter of their statutory authority, pursuant to their statuory and regulatory duties. Therefore, the suit against these officials is in reality an unconsented suit against the United States barred by the doctrine of sovereign immunity. The Tewa Tesuque v. Morton, No. 73-1817 (10th Cir., filed June 12, 1974). As such, the officials should be dismissed as parties-defendants.

22. That, the matter in controversy is not one that comes within the purview of 28 U.S.C., § 1353; and the subject of this litigation does not confer jurisdiction under the aforementioned section on this Court.

23. That, plaintiffs are not the proper parties to institute an action pursuant to 25 U.S.C.A., § 357, nor is the roadway sought for a public purpose.

24. That, the Indian Civil Rights Act, 25 U.S.C.A., 1302(8), as urged by plaintiffs, does not confer jurisdiction as there was no denial of equal protection as no

rights of plaintiffs were violated; and inasmuch as it does not affect the powers given to the Secretary of the Interior by Congress, it does not permit an evasion of the proper procedures to be followed in obtaining a right-of-way. Groundhog v. Keeler, 442 F. 2d 674 (10th Cir. 1971). Plaintiffs have not been denied equal protection of any tribal laws. Defendants have only sought compliance with such laws.

25. That, this Court will retain jurisdiction over this subject matter, thereby affording plaintiffs an opportunity to exhaust their administrative remedies and, after the completion of the administrative remedies, if required to do so, this Court will give further attention to the matters set forth in these Findings of Fact and Conclusions of Law.

26. That, an order shall be entered forthwith denying plaintiffs' prayer for declaratory judgment and permanent injunction.

Dated this 11th day of July, 1974.

/s/ Ewing T. Kerr
EWING T. KERR
Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C74-74

DRY CREEK LODGE, INC., a Wyoming Corporation, Its Officers and Directors, ALBERT C. COOK, ELIZABETH P. COOK, THOMAS BURLINGHAM, BENJAMIN MILLER, ROBERT MILLER, RAY NIEDO, ROSE NIEDO, and BERNICE MILLER,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, ROGERS MORTON, Secretary of the Interior, JAMES CANNON, Area Director of Bureau of Indian Affairs, Billings, Montana; CLYDE HOBBS, Superintendent, Wind River Indian Reservation, Fort Washakie, Wyoming; ARCHIE W. KEEP, as Special Agent, Wind River Indian Reservation, Fort Washakie, Wyoming, ARAPAHOE and SHOSHONI TRIBES, and the JOINT BUSINESS COUNCIL OF THE ARAPAHOE AND SHOSHONI TRIBES, JOE ENGAVO, ALFRED MCADAMS, ALFRED WARD, JAMES POGUE, ENOS ENOS, STARR WEED, JESS MILLER, ARNOLD HEADLEY, JOHN WARREN, FELIX GROSBECK, HUGH FRIDAY, ERNEST HANWAY, Individually, and as Members of the Joint Business Council of the Shoshoni and Arapahoe Tribes; MRS. LUCY BONATSIE, HELENE BONATSIE, PETERSON BERNATSIE, IRVING BONATSIE, DEATRICE BONATSIE, WAYLAND BONATSIE, Heirs of the Estate of Ed Bonatsie, Deceased,

Defendants.

JUDGMENT OF DISMISSAL

This cause came on for hearing on the motion of plaintiffs for a preliminary injunction; on the motions of the defendants to dismiss for lack of jurisdiction and for fail-

ure of the amended complaint to state a claim for relief; and on the motion of the non-Federal defendants to dissolve the temporary restraining order entered in this cause on May 21, 1974; and the Court having received evidence on June 7, 1974, and having considered the entire record in this case, having made and filed its findings of fact and conclusions of law, and having on the 11th day of July, 1974, denied the prayer for declaratory judgment and the application for permanent injunction, and retaining jurisdiction over the matter to afford plaintiffs an opportunity to exhaust their administrative remedies as provided by law; and the Court having given further consideration to said matter; NOW, THEREFORE,

IT IS ORDERED that the amended complaint, together with the several causes alleged therein, be, and the same are hereby dismissed with prejudice, the parties to pay their own costs.

Dated this 29th day of July, 1974.

EWING T. KERR
Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1546

[May 9, 1975]

DRY CREEK LODGE, INC., a Wyoming Corporation, Its Officers and Directors, ALBERT C. COOK, ELIZABETH P. COOK, THOMAS BURLINGHAM, BENJAMIN MILLER, ROBERT MILLER, RAY NIEDO, ROSE NIEDO, and BERNICE MILLER,

Plaintiffs-Appellants,

v.

THE UNITED STATES OF AMERICA, ROGERS MORTON, Secretary of the Interior, JAMES CANNON, Area Director of Bureau of Indian Affairs, Billings, Montana; CLYDE HOBBS, Superintendent, Wind River Indian Reservation, Fort Washakie, Wyoming; ARCHIE W. KEEP, as Special Agent, Wind River Indian Reservation, Fort Washakie, Wyoming, ARAPAHOE and SHOSHONE TRIBES, and the JOINT BUSINESS COUNCIL OF THE ARAPAHOE AND SHOSHONE TRIBES, JOE ENGAVO ,ALFRED MCADAMS, ALFRED WARD, JAMES POGUE, ENOS ENOS, STARR WEED, JESS MILLER, ARNOLD HEADLEY, JOHN WARREN, FELIX GROSBECK, HUGH FRIDAY, ERNEST HANWAY, Individually, and as Members of the Joint Business Council of the Shoshone and Arapahoe Tribes; MRS. LUCY BONATSIE, HELENE BONATSIE, PETERSON BONATSIE, IRVING BONATSIE, DEATRICE BONATSIE, WAYLAND BONATSIE, Heirs of the Estate of Ed Bonatsie, Deceased,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Wyoming

(D.C. No. C74-74)

G. L. Spence, Casper, Wyo. (John R. Hursh, Hamilton & Hursh, P. C., Riverton, Wyo., on the brief), for plaintiffs-appellants.

Marvin J. Sonosky, Washington, D.C. (Glen A. Wilkinson, Washington, D.C. and William J. Thomson, II, Cheyenne, Wyo., on the brief), for non-federal defendants-appellees.

Larry A. Boggs, Atty., Dept. of Justice, Washington, D.C. (Wallace H. Johnson, Asst. Atty. Gen., Richard V. Thomas, U.S. Atty., Cheyenne, Wyo., and George R. Hyde, Atty., Dept. of Justice, Washington, D.C., on the brief), for federal defendants-appellees.

Before SETH, McWILLIAMS and DOYLE, Circuit Judges.

WILLIAM E. DOYLE, Circuit Judge.

The primary question in this case is whether the trial court had subject matter jurisdiction. Following a hearing in which a preliminary injunction was sought and at which motions for dismissal and for summary judgment were filed on behalf of the federal defendants and the non-federal defendants, respectively, the court not only ruled that there was no jurisdiction but also ruled that there was no case on the merits. Some evidence was adduced and thus there was somewhat of a summary trial held at a preliminary stage of the proceedings.

This is an unusual case. The plaintiff claims a right of access to his property, on which he had built an inn or

hotel (a stopping off place for persons entering wilderness areas), from the main road on a three and one-half mile dirt road which crosses Indian properties held in trust by the United States for the benefit of individual Indians and the Shoshone and Arapahoe tribes. Appellants had never owned a right-of-way, but had been until the present allowed free use of the dirt road in question by permission of the six members of the Bonatsie family, who are members of the Shoshone tribe, and the other landowners.

The events which brought about the crisis leading to the lawsuit started in early 1974 when appellants built a small lodge having dining and drinking facilities on their property. This lodge was financed in part at least by the United States Small Business Administration. Its representatives had expressed some interest in the fact that there was not as a matter of right an access to the lodge. Counsel for appellants assured the SBA that this was no problem. The superintendent of the Wind River Indian Reservation testified that he advised the appellants that it would be necessary for them to obtain a formal right-of-way from the Bonatsies in order to have a right of egress and ingress. Notwithstanding the right-of-way problem, the lodge was completed, but on the day of the formal opening the members of the Bonatsie family together with the Joint Business Council of the tribes plus the superintendent of the Reservation erected a barricade across the road and stopped traffic in both directions. It is undisputed that employees of the Bureau of Indian Affairs aided in manning the barricade.

All of the foregoing led to the filing of the instant lawsuit in the United States District Court for the District of Wyoming. Named as defendants were the Secretary of the Interior, the area director of the Bureau of Indian Affairs, the superintendent of the Reservation, a special agent of the Reservation, the Indian tribes

together with the Joint Business Council of the tribes and its individual members, plus the Bonatsie family. Originally the court issued an ex parte restraining order as a result of which the barricade was removed. This order was entered May 21, 1974. On June 3 the non-federal defendants moved for summary judgment and the federal defendants moved to dismiss. Both movants raised the alleged lack of jurisdiction. On June 4, 1974, the plaintiffs moved for a preliminary injunction, and on June 7, 1974, a hearing was held on this motion, but prior to this an amended complaint had been filed which set forth the plaintiffs' contentions as to jurisdiction in some detail. At the June 7, 1974 hearing the plaintiffs maintained that the only issue before the court was the plaintiffs' request for a preliminary injunction together with the question as to the jurisdiction of the court to entertain the cause and motion. Counsel for appellants objected to any hearing on the merits. At the conclusion of the proceedings the parties agreed that they would maintain the status quo until the court ruled. The judgment of the court which was entered on July 11, 1974 denied the application for permanent injunction and denied also the claim seeking a declaratory judgment. The court retained jurisdiction so as to allow the plaintiffs to exhaust their remedies with the tribe and the Department of the Interior. However, without further notice the court proceeded to dismiss the cause of action on July 29, 1974. It is the propriety of these actions which we must review.

Plaintiffs contend:

1. The court erred in considering the merits and also its jurisdiction over the case without giving notice of intent to hear the merits in accordance with the Rules of Civil Procedure.

2. They maintain that it was error to issue what amounted to a summary judgment without giving the

requisite notice provided in Rule 56(c) of the Federal Rules of Civil Procedure.

3. They also contend that the court was in error in holding that it lacked jurisdiction and in denying the motion for preliminary injunction.

I.

Inasmuch as it appears from the record that the concern of the district court was with the question of jurisdiction to accept the cause and that this consideration affected, indeed governed, the rulings on the merits, it would seem to be proper first to inquire as to whether jurisdiction existed.

The complaint insofar as the United States and its agents are concerned alleges that the court had jurisdiction pursuant to 28 U.S.C. § 1331 to adjudicate their claims for a way of necessity and to issue a quiet title decree against the United States and the Indians as well, including the administrator of the estate of Ed Bonatsie.

A. Could the United States be a party?

At the outset we conclude that the trial court was correct in dismissing the claims as to the United States, because it had neither expressly nor impliedly consented to the suit.[1] The plaintiffs, however, allege that a consent was given (a waiver of immunity) as a result of enactment of 25 U.S.C. § 357, which in general provides that lands allotted to Indians may be condemned for any public purpose under the laws of the State or Territory where the land is located. Plaintiffs also point to a com-

[1] Dugan v. Rank, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963); Hawaii v. Gordon, 373 U.S. 57, 83 S.Ct. 1052, 10 L.Ed.2d 191 (1963); Malone v. Bowdoin, 369 U.S. 643, 82 S.Ct. 980, 8 L.Ed.2d 168 (1962); Larson v. Domestic & Foreign Corp., 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); Williams v. United States, 289 U.S. 553, 53 S.Ct. 751, 77 L.Ed. 1372 (1933).

panion Wyoming statute which allows one who has no outlet to a public road to obtain a private road through the Board of County Commissioners of his county. But we fail to see that either the federal statute or the Wyoming statute (Wyoming Stat. Ann. § 24-92) creates the necessary waiver of sovereign immunity. If it could be said that there was a waiver contained in § 357, *supra*, it would extend only to condemnations for public purpose. The Wyoming statute applies only to condemnations for private purpose. The law is well settled that waiver of sovereign immunity is to be strictly construed, and it is plain that Congress did not give its consent to suits against it by private individuals seeking private roads.

B. Immunity of the individual government officers.

It is contended that the defendants Rogers Morton, James Cannon, Clyde Hobbs and Archie W. Keep are also immune from suit because they were performing their functions as officers of the United States.[2] If the action against the officers was based only on their failure to provide or extend a way of necessity, the immunity would have to be upheld as to them as well as the government.

The question is, however, whether the sovereign immunity which belongs to the government extends to the officers on these facts. Federal jurisdiction does extend to federal officials even in the absence of a consent when they have acted beyond their statutory authority or where they have acted in an unconstitutional manner. The complaint herein alleges that the officers acted without au-

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[2] *See* Dugan v. Rank, *supra*; Malone v. Bowdoin, *supra*; Larson v. Domestic & Foreign Corp., *supra*; National Indian Youth Council v. Bruce, 485 F.2d 97 (10th Cir. 1973); McQueary v. Laird, 449 F.2d 608 (10th Cir. 1971); Chournos v. United States, 335 F.2d 918 (10th Cir. 1964).

thority or justification in maintaining the barricade. From the allegations of the complaint and the surrounding facts, it appears that the federal officers manned the barricades with the tribal councils and encouraged the latter to block access to plaintiffs' property. It is also alleged that the federal agents along with the other defendants conspired to deprive the plaintiffs of their civil rights in violation of 42 U.S.C. §§ 1983 and 1985 and that their rights are subject to vindication under 28 U.S.C. § 1343.

The trial court correctly ruled that the claim under § 1983 lacks merits because there is no showing that the defendants acted under color of state law, an essential requirement of the § 1983 suit. The court's dismissal of the § 1983 action was then correct.[3]

But this does not end the matter. There is a further contention that the court erred in dismissing plaintiffs' claim that the individual defendants other than the Secretary of the Interior conspired to deprive them of equal protection or equal privileges and immunities contrary to 42 U.S.C. § 1985. Here the presence or absence of state action is not a factor, for this provision embraces private conspiracies. *See* Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971). The plaintiffs' theory revealed in the complaint and at the hearing was that the blockade's purpose was deprivation of equal protection of the laws and of due process, and the plaintiffs maintain that they belong to a class which was the object of discrimination. The complaint also alleged that the blockade sought to block ingress and

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[3] *See* Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959); Williams v. Sisseton-Wahpeton Sioux Tribal Council, 387 F.Supp. 1194 (D.S.Dak. 1975); Loncassion v. Leekity, 334 F.Supp. 370 (D.N.Mex. 1971); Dodge v. Nakai, 298 F.Supp. 17 (D.Ariz. 1968); Toledo v. Pueblo de Jemez, 119 F.Supp. 429 (D.N.Mex. 1954).

egress of all persons, but this does not serve to dispose of the allegation that discrimination existed. It is true that the complaint does not detail the factual basis for this claim, but under the Rules of Civil Procedure detailed *evidence* need not be set forth in the complaint. *Cf.* Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

In holding that the court must entertain this claim we do not, of course, evaluate its merits. Inasmuch as there has not been a full-scale trial, the merits of the question are wide open and are to be determined from the evidence presented at a trial following discovery and other pretrial proceedings.

II.

A further ground for federal court jurisdiction advanced by plaintiffs is the constitutional tort doctrine enunciated in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). This was an aggravated search and seizure case in which federal agents invaded the plaintiffs' home by mistake and under color of authority as federal agents and conducted a narcotics search. Acting without a warrant, the officers entered and searched plaintiff's home. Arrest of the plaintiff was made and there was a threat to arrest the entire family. In the civil action against the agents the Fourth Amendment was invoked in the absence of a federal civil rights act. The district court dismissed the case on the ground that it did not state a cause of action. The court of appeals affirmed and the Supreme Court reversed. The question presented was whether the action could be entertained under the Fourth Amendment. The Court held that where rights under the Fourth Amendment have been violated "the courts will be alert to adjust their remedies so as to grant the necessary relief." The prior definitive case was the Supreme Court's decision in Bell

v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946). This was also a search and imprisonment case which alleged violation of federally protected constitutional rights. *Bell* was a pioneer decision which, although reserving the merits issue, recognized the power of the courts to entertain such a case and to fashion a remedy where it has not been provided by Congress. A necessity existed to redress injuries inflicted by federal officers contrary to the Constitution.

For our purpose the Bell v. Hood case and *Bivens* also recognize that the federal jurisdiction requirement is satisfied by allegations in the complaint, even though not specific, which describe the violation of constitutional rights.[4]

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[4] On the question of jurisdiction the Supreme Court through Justice Black distinguished between a decision on jurisdiction and one on the merits as follows:

> Though the mere failure to set out the federal or Constitutional claims as specifically as petitioners have done would not always be conclusive against the party bringing the suit, where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit. Thus allegations far less specific than the ones in the complaint before us have been held adequate to show that the matter in controversy arose under the Constitution of the United States. Wiley v. Sinkler, 179 U.S. 58, 64, 65, 21 S.Ct. 17, 20, 45 L.Ed. 84; Swafford v. Templeton, 185 U.S. 487, 491, 492, 22 S.Ct. 783, 784, 785, 46 L.Ed. 1005. The reason for this is that the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy.
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> Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint

Unless, then, it can be said that the allegations in the case at bar are patently insubstantial and frivolous, the plaintiffs are entitled to proceed beyond the threshold of the court and have their case heard on its merits. It cannot be said from a reading of the allegations of the complaint that plaintiffs' claim is wholly insubstantial and frivolous. We are cognizant of the fact that the claim at bar differs from those which were litigated in Bell v. Hood and in *Bivens*, but those decisions did not limit a constitutional action to a Fourth Amendment violation, and indeed the courts which have considered claims deriving from other violations of the Constitution have applied the doctrine in other areas.[5]

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states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. Swafford v. Templeton, 185 U.S. 487, 493, 494, 22 S.Ct. 783, 785, 786, 46 L.Ed. 1005; Binderup v. Pathe Exchange, 263 U.S. 291, 305-308, 44 S.Ct. 96, 98-99, 68 L.Ed. 308. The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous. The accuracy of calling these dismissals jurisdictional has been questioned. The Fair v. Kohler Die & Specialty Co., supra, 228 U.S. at page 25, 33 S.Ct. at page 411, 57 L.Ed. 716. But cf. Swafford v. Templeton, supra.

327 U.S. at 681, 682, 66 S.Ct. at 775.

[5] There are some decisions which recognize the existence of a civil action to redress the violation of federal rights other than under the Fourth Amendment. *See, for example*, United States ex rel. Moore v. Koelzer, 457 F.2d 892 (3d Cir. 1972); Howard v. Warden, Petersburg Reformatory, 348 F.Supp. 1204 (E.D.Va. 1972). *But see* Moore v. Schlesinger, 384 F.Supp. 163 (D.Colo. 1974).

We hasten to add that we do not judge either the sufficiency of the complaint or the case's intrinsic merits. We do hold that the allegations sufficiently allege the existence of federal jurisdiction entitling the plaintiffs to have their day in court.

III.

The final question is whether the court erred in dismissing plaintiffs' claims against the tribes, the Joint Business Council and its agents. The contention is that there was jurisdiction under 25 U.S.C. § 1302, the Indian Civil Rights Act, which in pertinent part reads:

> No Indian tribe in exercising powers of self-government shall—. . .
>
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

The complaint seeks injunctive relief against the tribes and the Tribal Councils from interfering by blockading the road and thus preventing the plaintiffs from making use of the connecting road. Appellants say that this violates their rights under the due process and equal protection clauses of the Act. Section 1302, *supra*, does not by its terms extend to the district court's jurisdiction over claims arising under this provision. However, the courts which have considered the question have held that 28 U.S.C. § 1343(4) provides a remedy in federal court for the prosecution of these deprivations.[6]

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[6] Crowe v. Eastern Band of Cherokee Indians, Inc., 506 F.2d 1231 (4th Cir. 1974); Thompson v. Tonasket, 487 F.2d 316 (9th Cir. 1973), cert. denied, 416 U.S. 954, 94 S.Ct. 1967, 40 L.Ed.2d 304 (1974); Brown v. United States, 486 F.2d 658 (8th Cir. 1973); Johnson v. Lower Elwha Tribal Community, 484 F.2d 200 (9th Cir. 1973); Daly v. United States, 483 F.2d 700 (8th Cir. 1973); Melvin White Eagle v. Philomene One Feather, 478 F.2d 1311 (8th Cir. 1973); Luxon v. Rosebud Sioux Tribe of South Dakota, 455 F.2d 698 (8th Cir. 1972); Williams v. Sisseton-Wahpeton

Our court has had this general question before it on three occasions, but has not reached the present issue. Slattery v. Arapahoe Tribal Council, 453 F.2d 278 (10th Cir. 1971) and Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971). It was held in *Groundhog* that there were insufficient jurisdictional facts to bring the case within the provisions of § 1302. In McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974), this court refrained from ruling on the applicability of § 1302 because the plaintiffs had not exhausted tribal remedies.[7]

Sioux Tribal Council, 387 F.Supp. 1194 (D.S.Dak. 1975); White v. Tribal Council, Red Lake Band of Chippewa Indians, 383 F.Supp. 810 (D.Minn. 1974); Means v. Wilson, 383 F.Supp. 378 (D.S.Dak. 1974); Hickey v. Crow Creek Housing Auth., 379 F.Supp. 1002 (D.S.Dak. 1974); McCurdy v. Steele, 353 F.Supp. 629 (D.Utah 1973); rev'd on other grounds, 506 F.2d 653 (10th Cir. 1974); Seneca Constitutional Rights Organization v. George, 348 F.Supp. 48 (W.D.N.Y. 1972); Solomon v. LaRose, 335 F.Supp. 715 (D. Neb. 1971); Loncassion v. Leekity, 334 F.Supp. 370 (D.N.Mex. 1971); Spotted Eagle v. Blackfeet Tribe of Blackfeet Indian Reservation, 301 F.Supp. 85 (D.Mont. 1969). *But see* Pinnow v. Shoshone Tribal Council, 314 F.Supp. 1157 (D.Wyo. 1970), aff'd on other grounds sub nom. Slattery v. Arapahoe Tribal Council, 453 F.2d 278 (10th Cir. 1971). *Cf.* Yellow Bird v. Oglala Sioux Tribe of South Dakota, 380 F.Supp. 438 (D.S.Dak. 1974); Lefthand v. Crow Tribal Council, 329 F.Supp. 738 (D.Mont. 1971).

[7] In the present case a decision on the question is unavoidable, because of its procedural posture. Since only three days notice was given to the plaintiffs that the defendants were seeking dismissal at the preliminary injunction hearing, the only issue properly before the trial court was its subject matter jurisdiction. The defendants raised the issue of exhaustion of administrative remedies at the hearing and the court ruled that the plaintiffs had failed to exhaust. However, the "long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted" does not go to the subject matter jurisdiction of the court. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51, 58 S.Ct. 459, 82 L.Ed. 638 (1938); *see* McKart v. United States, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194

From an examination of the authorities, we are of the opinion that 25 U.S.C. § 1302, which recognizes the right to be protected against deprivation of due process and equal protection of the laws, furnishes a jurisdictional basis which justifies the federal court's entertaining of the case. The plaintiffs are non-Indians and so there remains the question whether an action under the Indian Bill of Rights contemplates an action by one who is not an Indian. There is little law on this subject. The cases that have considered § 1302 have held that in view of the legislative history, it applies to non-Indians as well as Indians who are under the jurisdiction of the tribe.

A district court case from Arizona, Dodge v. Nakai, 298 F.Supp. 17 (D. Ariz. 1968), involved a non-Indian plaintiff's rights against the tribal council. The court held that it had jurisdiction over the controversy between the non-Indian against the tribal council.

In Hickey v. Crow Creek Housing Authority, 379 F. Supp. 1002 (D. S. Dak. 1974), a non-Indian had entered into a contract with the tribal housing authority to drill three wells. In an action under the Indian Civil Rights Act, it was alleged that he had been deprived of due process. The court recognized § 1302 to be available to non-Indians as well as Indians, but it further held that the complaint failed to state sufficient facts to give the court jurisdiction under 28 U.S.C. § 1343(4).

An Eighth Circuit decision contains a dictum which says that § 1302(8) applies to any person within tribal jurisdiction. Schantz v. White Lightning, 502 F.2d 67, 70 n.5 (8th Cir. 1974). The legislative history which has been referred to is discussed fully in the opinion of Judge

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(1969); 3 K. Davis, Administrative Law Treatise § 20.02. It is clear from the transcript of the preliminary injunction hearing that plaintiffs' counsel was not prepared to argue the exhaustion point. Fairness requires that he be given that opportunity.

Craig in Dodge v. Nakai, *supra*. The court there concluded that Congress intended § 1302 to apply to all persons.[8] It is indeed difficult to reach any other conclusion since by its terms it extends to all persons.

The allegations of the complaint are to the effect that plaintiffs have a property right in the access road and that the part of the road which was blocked was within tribal jurisdiction. It was also alleged that the tribe summoned the federal agents to maintain and supervise the barricade of that road, and that this constituted a violation of the Indian Civil Rights Act. We recognize that this may not be the strongest case imaginable under the Indian Civil Rights Act, but determining the merits

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[8] Initially, legislation was proposed that imposed upon Indian tribes the same limitations and restraints as those which are imposed on the federal government by the United States Constitution. Objections to this whole scale application of the Bill of Rights to Indian tribes were voiced in hearings conducted in June, 1965. The Department of the Interior offered a substitute bill that spelled out in specific terms the rights Indians would possess in their relationships with tribal governments. The substitute bill specifically referred to "American Indians" in delineating the rights to be established. *See* Hearings on the Constitutional Rights of American Indians Before the Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary, 89th Cong., 1st Sess., at 5, 317-18 (1965). In May, 1966, the Department of the Interior submitted supplemental testimony and a revision of the substitute bill that was intended to establish rights for all persons who may be subject to the jurisdiction of tribal governments, whether Indians or non-Indians. *See* Summary Report on the Constitutional Rights of American Indians of the Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary, 89th Cong., 2d Sess., at 9-10 (1966). At this point, along with immaterial changes, the term "any person" was substituted for the term "American Indian" throughout the bill that eventually became Title II. That language remained in the bill up to and including the time of its enactment into law.

Dodge v. Nakai, *supra*, at 24.

is not our function. We are, however, of the opinion that the allegations are sufficient to give the court jurisdiction to hear the merits and we say that it should be a regular trial and not a summary hearing.

We have not failed to consider the contention of the tribes and the Joint Council that they are protected from suit by the doctrine of tribal immunity, but the cases which have considered § 1302 have held that this enactment is a waiver by Congress of this immunity.[9]

From the fact that the lower court had jurisdiction over the tribes and the Joint Business Council, it does not follow that it had jurisdiction over the individual members of the tribes and the Council or over the individual federal agents. Section 1302 speaks only to tribe action, and it has been held that it does not give rise to jurisdiction under 28 U.S.C. § 1343 over individual tribal members.[10] Thus, the trial court did not err in holding that it lacked jurisdiction to award damages or declaratory relief against the individual defendants. Of course, to the extent that individuals are acting as agents for the tribes or the Council, the court does possess jurisdiction to extend injunctive relief to the individual agents.[11]

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[9] *See* Brown v. United States, 486 F.2d 658 (8th Cir. 1973); Johnson v. Lower Elwha Tribal Community, 484 F.2d 200 (9th Cir. 1973); Daly v. United States, 483 F.2d 700 (8th Cir. 1973); McCurdy v. Steele, 353 F.Supp. 629 (D.Utah 1973); Seneca Constitutional Rights Organization v. George, 348 F.Supp. 48 (W.D.N.Y. 1972); Loncassion v. Leekity, 334 F.Supp. 370 (D.N.Mex. 1971). *But see* Pinnow v. Shoshone Tribal Council, 314 F.Supp. 1157 (D. Wyo. 1970), aff'd on other grounds sub nom. Slattery v. Arapahoe Tribal Council, 453 F.2d 278 (10th Cir. 1971).

[10] *See* Means v. Wilson, 383 F.Supp. 378 (D.S.Dak. 1974); Spotted Eagle v. Blackfeet Tribe of Blackfeet Indian Reservation, 301 F.Supp. 85 (D.Mont. 1969); Dodge v. Nakai, 298 F.Supp. 17 (D.Ariz. 1968).

[11] The plaintiffs assert as an additional basis for jurisdiction over the defendants 28 U.S.C. § 1353. However, this Circuit has

IV.

Where, as here, jurisdiction of the court is invoked by plaintiffs on grounds which if true spell out the existence of federal jurisdiction, the cause must be entertained for the purpose of fully determining the merits either by way of motion or by trial. *See* Bell v. Hood, *supra*, and Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, *supra*. *See also* Wheeldin v. Wheeler, 373 U.S. 647, 83 S.Ct. 1441, 10 L.Ed.2d 605 (1963).[12]

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previously held that § 1353 was enacted for the narrow purpose of giving district courts jurisdiction over claims of right to original allotments or allotments in the first instance. *See* Prairie Band of Pottawatomie Tribe of Indians v. Puckkee, 321 F.2d 767 (10th Cir. 1963). This is not such a case.

[12] In this case the opinion of the Court was by Justice Douglas. The plaintiff had been subpoenaed before the House Un-American Activities Committee. These subpoenas had been issued in blank and the agent had filled in the plaintiff's name. The suit was brought under the Constitution just as Bell v. Hood and *Bivens*. On the issue of jurisdiction the Court simply said:

> We agree with the Court of Appeals in its first opinion (280 F.2d 293) that on the face of the complaint the federal court had jurisdiction. As we stated in Bell v. Hood, 327 U.S. 678, 685, 66 S.Ct. 773, 777, 90 L.Ed. 939, "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the district court has jurisdiction." And see Bock v. Perkins, 139 U.S. 628, 630, 11 S.Ct. 677, 678, 35 L.Ed. 314.
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> But on the undisputed facts, as they appear on argument of the case, no federal cause of action can be made out. Dawson's main reliance is on the Fourth Amendment, which protects a person against unreasonable searches and seizures. Its violation, he contends, occurred when an unauthorized subpoena was served on him. But there was neither a search nor a seizure of him. He was neither arrested nor detained pursuant to any subpoena; nor, so far as the complaint discloses, did he respond to the subpoena and either testify or refuse to testify;

As has been demonstrated above, the amended complaint sufficiently invoked the jurisdiction of the federal court, whereby the court was required to deal with the claims asserted on their merits. The fact that it appeared to the trial court that the cause as a whole lacked merit did not justify the procedures which were taken.

As we view it, the hearing on preliminary injunction became a hearing on the merits. This was done without notice pursuant to Rule 65(a)(2) and without giving the requisite 10 days notice required by Rule 56(c), Federal Rules of Civil Procedure. We conclude that if a case had been wholly found lacking in procedural basis so as to justify dismissal as being frivolous, this summary disposition might have been permissible, but as we have shown above, such an out of hand disposition was not appropriate at bar.

Moreover, notice is an essential prerequisite to an order to change a hearing on preliminary injunction to a hearing on the merits.[13]

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nor was the subpoena used to cite him for contempt. *Cf.* Williams v. United States, 341 U.S. 97, 71 S.Ct. 576, 95 L.Ed. 774. In short, the facts alleged do not establish a violation of the Fourth Amendment. And the provisions of the Civil Rights Act are clearly inapplicable to this kind of case. *See* R.S. §§ 1979, 1980, 42 U.S.C. §§ 1983, 1985; Tenny v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019; Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492.

373 U.S. at 649, 83 S.Ct. at 1444.

[13] *See* S. E. C. v. Pearson, 426 F.2d 1339 (10th Cir. 1970); Sooner State Dairies, Inc. v. Townley's Dairy Co., 406 F.2d 1328 (10th Cir. 1969). *See also* Pughsley v. 3750 Lake Shore Drive Cooperative Bldg., 463 F.2d 1055 (7th Cir. 1972); Eli Lilly & Co. v. Generix Drug Sales, Inc., 460 F.2d 1096, 1106 (5th Cir. 1972); Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971); T. M. T. Trailer Ferry, Inc. v. Union de Tronquistas de Puerto Rico, Local 901, 453 F.2d 1171 (1st Cir. 1971); Brooks v. Nacrelli, 415 F.2d 272 (3d Cir. 1969); 7 J. Moore, Moore's Federal

True, the plaintiffs received three days notice that the defendants were moving for a dismissal, but the hearing at bar was more than one on motion to dismiss. Not only was it a summary judgment issue, the court heard testimony also. The 10 day notice provision of Rule 56 alone would prohibit this.[14]

As to the matter of dismissal for lack of jurisdiction, we finally point out that a question like the plaintiffs' inability to sue the United States because of sovereign immunity would be appropriately dismissed on a summary basis. We must conclude that the case called for a trial or hearing on the merits, and that it was improper for the court to determine such issues as exhaustion of administrative remedies and a determination that the defendants were entitled to prevail on the merits of the claim.[15]

Practice ¶ 65.04[4] at 65-67 (1972); 11 C. Wright and A. Miller, Federal Practice and Procedure § 2950 at 486 (1973).

Some courts have allowed consolidation without notice in special circumstances. *See* Bright v. Nunn, 448 F.2d 245 (6th Cir. 1971); Singleton v. Anson County Bd. of Educ., 387 F.2d 349 (4th Cir. 1967); Williamson v. Hampton Management Co., 339 F.Supp. 1146 (N.D.Ill. 1972); 11 C. Wright & A. Miller, *supra*, § 2950 at 490-91.

[14] *See* Adams v. Campbell County School Dist., 483 F.2d 1351 (10th Cir. 1973); Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 480 F.2d 607 (10th Cir. 1973); Santiago v. Corporacion de Renovacion Urbana, 453 F.2d 794 (1st Cir. 1972); Georgia Southern & F. Ry. Co. v. Atlantic Coast Line R. Co., 373 F.2d 493 (5th Cir. 1967); 10 C. Wright & A. Miller, *supra*, § 2719 at 458; 11 C. Wright & A. Miller, *supra*, § 2950 at 492.

[15] In Conclusion of Law No. 4 the court found on the merits that the Cooks did not have a right of way by necessity, because other access was available. In Conclusions of Law Nos. 19 and 24 the court held that the Plaintiffs had not been deprived of equal protection of federal or tribal laws. In Conclusions of Law Nos. 8-12 the court held that the Plaintiffs had not exhausted their administrative remedies.

In sum, we conclude that the cause is not so lacking in merit as to justify a summary disposition. Discovery of the facts and full presentation thereof were essential.

Accordingly, then, the judgment of the district court is reversed and the cause is remanded for further proceedings consistent with the views expressed herein.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

C 74-74A

DRY CREEK LODGE, INC., a Wyoming corporation, its Officers and Directors, ALBERT C. COOK, ELIZABETH C. COOK, THOMAS BURLINGHAM, BENJAMIN MILLER, ROBERT MILLER, RAY NIEDO, ROSE NIEDO, BERNICE MILLER, JOHN GUINA, ZELLA GUINA, EMMETT WASHAKIE, BEATRICE WASHAKIE, ETHELENE POTTER and DAVID MILLER,

Plaintiffs,

v.

JAMES CANAN, Area Director of Bureau of Indian Affairs, Billings, Montana; CLYDE HOBBS, Superintendent, Wind River Indian Reservation, Fort Washakie, Wyoming; ARCHIE W. KEEP, as Special Agent, Wind River Indian Reservation, Fort Washakie, Wyoming; ARAPAHOE AND SHOSHONE TRIBES, MRS. LUCY BONATSIE, HELENE BONATSIE, BEATRICE BONATSIE, IRVING BONATSIE, PETERSON BONATSIE, WAYLAND BONATSIE, Heirs of the Estate of Ed Bonatsie, Deceased, and RALPHAELITA STUMP,

Defendants.

JUDGMENT

In the above-entitled matter the court, on the 19th day of April, 1977, heard the arguments of counsel on defendants' motion for summary judgment. The court carefully examined the briefs and on the 26th day of

April, 1977, entered its order dismissing Counts IV and V of the six-count amended complaint. The trial of the remaining four counts began before a jury on the 2nd day of May, 1977. Witnesses were sworn and testified for both sides and counsel made their arguments.

In the course of trial the court ruled that Count VI would be heard and determined by the court itself, based upon the evidence sumitted on that issue and upon the arguments of counsel on the law. Upon the arguments being made, the court found, as noted more fully in the record, that under the facts and law applicable that the road in question was not a public road. The court therefore dismissed Count VI.

Upon the conclusion of the evidence in the case, defendants made and argued motions for directed verdict. The court granted the motion as to Count II as to all defendants. Further, the court granted the motion by dismissing out defendant James Canan and plaintiffs Ray Niedo, Rose Niedo, John Guina, Zella Guina, Emmett Washakie, Beatrice Washakie, and Ethelene Potter, for the reasons stated in the record.

The court granted the motion for directed verdict as to the claim of the plaintiffs for deprivation of property without due process in Count I, and also granted the same as to plaintiffs' claim of denial of equal protection and deprivation of property without due process in Count III.

The remaining issues—denial of equal protection and deprivation of liberty without due process against the defendant Tribes in Count I, and deprivation of liberty without due process in Count III against defendants Archie W. Keep and Clyde Hobbs—were presented to the jury for their determination.

The jury entered the following verdict. On the claim for deprivation of liberty without due process of law

under Count I, the jury found for each of the plaintiffs and against the defendant Tribes.

On the claim for deprivation of liberty without due process of law under Count III, the jury found for the defendants Clyde Hobbs and Archie W. Keep and against the plaintiffs, no cause of action.

On the claim for denial of equal protection of the laws under Count I, the jury found for the plaintiffs Albert C. Cook and Elizabeth P. Cook and against the defendant Tribes. The jury found for the defendant Tribes and against the remaining plaintiffs, no cause of action on the claim for denial of equal protection.

Based on the jury's findings as set forth hereinabove the jury awarded damages to the plaintiffs and against the defendant Tribes in the following amounts: Albert C. Cook, $250,000; Elizabeth P. Cook, $250,000; Thomas Burlingham, $5,000; Benjamin Miller, $5,000; Bernice Miller, $5,000; David Miller, $5,000; and Robert Miller, $5,000.

Based upon the foregoing rulings and the verdict of the jury, the court enters judgment as follows:

IT IS ORDERED AND ADJUDGED as follows that:

1. On defendants' motions for summary judgment Counts IV and V are dismissed with prejudice.

2. On defendants' motions for directed verdicts Count II is dismissed with prejudice.

3. On the defendants' motions for directed verdict the case against defendant James Canan is dismissed with prejudice.

4. Further, on the basis of said motions, the case is dismissed as to the plaintiffs Ray Niedo, Rose Niedo, John Guina, Zella Guina, Emmett Washakie, Beatrice Washakie and Ethelene Potter, with prejudice.

5. As to Count VI, which was tried to the court, based upon the findings and the ruling of the court made upon the record, Count VI is dismissed with prejudice.

6. On defendants' motions for directed verdict the court dismissed with prejudice plaintiffs' claims under Count I for deprivation of property without due process and of the claims of denial of equal protection and deprivation of property without due process in Count III, with prejudice.

7. Based on the verdict of the jury,

a) The court enters judgment in favor of defendants Clyde Hobbs and Archie Keep, no cause of action on plaintiffs' complaint in Count III wherein plaintiffs claim deprivation of liberty without due process of law.

b) The court enters judgment for the plaintiffs Albert C. Cook for $250,000 and Elizabeth P. Cook for $250,000 against the defendant Tribes, jointly and severally, on plaintiffs' claim of deprivation of liberty without due process and of denial of equal protection of laws under Count I.

c) The court enters judgment for the plaintiffs Thomas Burlingham, Benjamin Miller, Bernice Miller, David Miller, and Robert Miller, $5,000 each against the defendant Tribes, jointly and severally, on plaintiffs' claim of deprivation of liberty without due process, and no cause of action on their claim for denial of equal protection under Count I.

DATED this 18 day of July, 1977.

/s/ Aldon J. Anderson
ALDON J. ANDERSON
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

C74-74A

DRY CREEK LODGE, INC., a Wyoming corporation, its Officers and Directors, ALBERT C. COOK, ELIZABETH C. COOK, THOMAS BURLINGHAM, BENJAMIN MILLER, ROBERT MILLER, RAY NIEDO, ROSE NIEDO, BERNICE MILLER, JOHN GUINA, ZELLA GUINA, EMMETT WASHAKIE, BEATRICE WASHAKIE, ETHELENE POTTER and DAVID MILLER,

Plaintiffs,

v.

JAMES CANAN, Area Director of Bureau of Indian Affairs, Billings, Montana; CLYDE HOBBS, Superintendent, Wind River Indian Reservation, Fort Washakie, Wyoming; ARCHIE W. KEEP, as Special Agent, Wind River Indian Reservation, Fort Washakie, Wyoming; ARAPAHOE AND SHOSHONE TRIBES, MRS. LUCY BONATSIE, HELENE BONATSIE, DEEATRICE BONATSIE, IRVING BONATSIE, PETERSON BONATSIE, WAYLAND BONATSIE, Heirs of the Estate of Ed Bonatsie, Deceased, and RALPHAELITA STUMP,

Defendants.

ORDER RULING ON MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT, FOR NEW TRIAL OR FOR REMITTITUR

Upon the Motion of defendant, Arapahoe and Shoshone Tribes, for a Judgment notwithstanding the verdict, for a new trial, or remittitur, coming on for hearing before the Court on February 3, 1978, at the hour of

2:00 p.m.; plaintiffs, Albert C. Cook and Elizabeth P. Cook, having appeared in person and with their attorney, John R. Hursh, the other plaintiffs having appeared through their attorney, John R. Hursh; the defendant, Arapahoe and Shoshone Tribes having appeared through their original counsel of record, Marvin J. Sonosky, who requested but was not granted leave to participate in the hearing, and through their attorney, W. W. Reeves; briefs having previously been filed; and the Court having heard and considered the oral arguments of counsel at the hearing, and being fully advised in the premises,

IT IS ORDERED that:

1. The Motion of the Tribes for judgment notwithstanding the verdict is denied.

2. The Motion of the Tribes for a new trial with respect to liability and damages is granted, and the Judgment entered in the above-entitled matter against the defendant, Arapahoe and Shoshone Tribes is set aside, but the Judgment and Final Order entered with respect to all other defendants shall continue in full force and effect.

3. The Clerk's certification of costs is set aside pending retrial or other disposition of the case.

Dated this 18 day of February, 1978.

BY THE COURT:

/s/ Aldon J. Anderson
ALDON J. ANDERSON
District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C74-74A

[October 12, 1978]

DRY CREEK LODGE, INC., *et al.*,
Plaintiffs,

v.

JAMES CANAN, Area Director of Bureau of Indian Affairs, Billings, Montana, *et al.*,
Defendants.

ORDER

This cause, having come on before the Court on the defendant Shoshone and Arapahoe Tribes' motion to dismiss, and the Court having been fully advised, it is

ORDERED That this action is dismissed with prejudice as to the sole remaining defendants, the Shoshone and Arapahoe Tribes, for the reasons stated on the record by the Court at the hearing on September 11, 1978, and, specifically, because *Santa Clara Pueblo v. Martinez*, —— U.S. ——, 46 U.S.L.W. 4412 (decided May 15, 1978), squarely applies to this action, and it is

FURTHER ORDERED That costs shall be paid to defendants Shoshone and Arapahoe Tribes.

/s/ Aldon J. Anderson
ALDON J. ANDERSON
United States District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

No. C74-74A

[September 11, 1978]

DRY CREEK LODGE, INC., *et al.*

v.

JAMES CANAN, Area Director of Bureau of Indian Affairs, Billings, Wyoming, *et al.*

ORAL RULING ON TRIBES MOTION TO DISMISS
(Excerpt from Hearing Transcript)

THE COURT: Well, it's a case that has given all of us concern, I'm sure, to those who feel they have been wronged as to the Cooks and to those who were in support of them, the other plaintiffs. The result which is contended for is very difficult to understand. I would, in an effort to provide some clarification to those matters, a rationale of the decision, I would like to read a few statements from this Supreme Court decision. I am just picking out a few that I have noted.

First of all, Indian law is very complex and difficult even to lawyers and judges because it is, in effect, a system within a system. But, I am reading now from the beginning of Roman numeral two in the opinion, "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self government." That's important to remember.

Next, "As separate sovereigns preexisting the Constitution, tribes have historically been regarded as un-

constrained by those constitutional provisions framed specifically as limitations on federal or state authorities." Unconstrained by constitutional provisions.

"As the Court in Talton recognized, however, Congress has plenary authority to limit, modify or eliminate the powers of local self government which the tribes otherwise possess." So, the Cooks are not without any forum other than the Indian courts under the ruling of this case as contended for by the defendant tribes.

But Congress has plenary power with respect to the tribes.

Moving on, "In 25 U.S.C. 1302, Congress acted to modify the effect of Talton on its progeny by imposing certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment."

Now, that much we knew and understood as we tried Dry Creek. And this Court and the Tenth Circuit interpreted the Indian Civil Rights Act to justify the—an implied right of action in view of the setting of the statute and its seemed intended purposes.

But, the Supreme Court corrects the Tenth Circuit and myself in this respect. It says, "In 25 U.S.C. 1303, the only remedial provision expressly supplied by Congress, the 'privilege of the writ of habeas corpus' is made 'available to any person, in a court of the United States to test the legality of his detention by order of an Indian tribe'."

And in this case, the Santa Clara case the "petitioners had conceded that 1302 modified the substantive law applicable to the tribe. They argued, however, that Congress did not intend to authorize federal courts to review violations of its provisions except as they might arise on habeas corpus. They argued, further, that Congress did

not waive the tribe's sovereign immunity from suit. Respondents, on the other hand contend that 1302 not only modifies the substantive law applicable to the exercise of sovereign tribal powers, but also authorizes civil suits for equitable relief against the tribe and its officers in federal courts." And so, the issue is squarely before them. And without quoting too much I would like to pick out one or the other points of importance.

"Where Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will desert the other. Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it might be in securing compliance with 1302"—those are the products of the Indian Civil Rights Act—"plainly would be at odds with the congressional goal of protecting tribal self government. Not only would it undermine the authority of tribal forums but, it would also impose serious financial burdens on already 'financially disadvantaged' tribes."

And then they quote from the subcommittee on constitutional rights, senate judiciary committee, constitutional rights of the American Indian, summary report of hearings and investigations held in Congress at the time this legislation was passed.

"Moreover, contrary to the reasoning of the court below, implementation of a federal remedy in addition to habeas corpus is not plainly required to give effect to Congress' objective of extending constitutional norms to tribal self government. Tribal forums are available to vindicate rights created by the Indian Civil Rights Act and 1302 has substantial and intended effect of changing the law which these forums are obliged to apply. Tribal courts have repeatedly been recognized as appropriate forums for the exclusion of adjudication of disputes

affecting important personal and property interests of both Indians and non-Indians," in citing several cases.

They went on further to say that "non-judicial tribal institutions have also been recognized as competent law-abiding bodies. Under these circumstances, we are reluctant to disturb the balance between the dual statutory objectives which Congress apparently struck in providing only for habeas corpus relief."

So, the nub of their holdings, "suits against the tribe under the Indian Civil Rights Act, are barred by the tribe's sovereign immunity from suit." Since nothing on the face of the Act purports to subject tribes to the jurisdiction of federal courts in civil actions for declaratory or injunctive relief.

Second, nor does Section 1302 impliedly authorize a private cause of action for declaratory and injunctive relief against the Pueblo's governor. Congress' failure to provide remedies other than habeas corpus for the enforcement of the Indian Civil Rights Act was deliberate as was manifest from the structure of the statutory scheme and legislative history. Congress was committed to the goal of tribal self determination. Section 1302 selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique needs of tribal government. Creation of a federal cause of action for the enforcement of 1302 rights would not comport with the approved congressional goal of protecting tribal self government.

Tribal courts which have repeatedly recognized as appropriate forums for adjudicating disputes involving important interests of both Indians and non-Indians are available to vindicate rights available by the Indian Civil Rights Act.

After considering numerous alternatives for review of numerous tribal convictions Congress apparently de-

cided that review by way of habeas would adequately protect the individual interests at stake while avoiding unnecessary intrusions on tribal government. Similarly, Congress considered and rejected proposal for federal review of alleged violations of the Indian Civil Rights Act arising in the civil context. It is thus clear that only the limited review mechanism of Section 1303 which is the habeas section, was contemplated. By not exposing tribal officials to the full array of federal remedies available to redress actions of federal and state officials, Congress may also have considered that resolution of statutory issues under 1302 and particularly those issues likely to arise in a civil context will frequently depend upon questions of tribal tradition and customs that tribal forums may be in a better position to evaluate than federal courts."

It seems to me clear, Mr. Hursh, from those salient provisions in the opinion of the Supreme Court the Court has no choice. The counsel for the tribes has corrected the Court with respect to the difference between the ruling of the Court as it applied to the tribes and as it applied to the governor of the Pueblo, but, the portions that I have referred to seem to clearly, manifestly require this Court to grant the motion and to leave you to your right of appeal.

It is a matter about which there may be strong difference of opinion as to whether or not generally and certainly in particular situations there is sufficient adequacy to provide the fairness that non-Indians have come to expect in the courts which obtain in the state and federal courts. But, be that as it may the law of the land has been determined and for the purposes set forth the Supreme Court has determined that the Congress has so acted and Congress has plenary power in

these matters and their determination is binding and this Court recognizes it and so rules.

Thank you.

(Thereupon the proceedings continued but not transcribed herein.)

APPENDIX I

JULY TERM—July 18, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges

No. 78-1999

DRY CREEK LODGE, INC., a Wyoming corporation, its officers and directors; ALBERT C. COOK, ELIZABETH C. COOK, ALBERT C. COOK, as executor of the estate of Thomas C. Burlingham, deceased; BENJAMIN MILLER; ROBERT MILLER; and DAVID MILLER,

Plaintiffs-Appellants,

vs.

ARAPAHOE and SHOSHONE TRIBES,

Defendants-Appellees.

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing en banc filed in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of

Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX J

JULY TERM—July 22, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges

No. 78-1999

DRY CREEK LODGE, INC., a Wyoming corporation, its officers and directors; ALBERT C. COOK, ELIZABETH C. COOK, ALBERT C. COOK, as executor of the estate of Thomas C. Burlingham, deceased; BENJAMIN MILLER; ROBERT MILLER; and DAVID MILLER,

Plaintiffs-Appellants,

vs.

ARAPAHOE and SHOSHONE TRIBES,

Defendants-Appellees.

The Court, in order to correct a clerical error made in the Court's order dated July 18, 1980, in the captioned cause does hereby reissue said order nunc pro tunc to read in its entirety as follows:

"This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing en banc filed in the captioned case.

"Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted. Circuit Judge Holloway voted to grant rehearing by the panel.

"The petition for rehearing having been denied by the panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied."

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX K

Indian Civil Rights Act of 1968, 25 U.S.C. Sections 1301-1303.

§ 1301. Definitions

For purposes of this subchapter, the term—

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and

(3) "Indian court" means any Indian tribal court or court of Indian offense.

§ 1302. Constitutional rights

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peacefully to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its law or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

§ 1303. Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.